Petition

81-1968

No.

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Supreme Court of the United States

October Term, 1981

ANTHONY LIBERATORE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury on bribery, 18 U.S.C. Section 201, and the Sixth Circuit's decision affirming the instruction is in direct conflict with the decisions of the Courts of Appeal for the Fourth, Ninth and Tenth Circuits.

2. Whether the evidence was insufficient to sustain the verdict returned by the jury based upon erroneous instructions on the crime of bribery, 18 U.S.C. Section 201.

TABLE OF CONTENTS

Questions Presented I
Table of Authorities IV
Opinion Below 1
Jurisdiction 2
Statutory Provisions Involved 2
Statement of the Case 4
Statement of Facts 5
Argument 13

I. The trial court erred in instructing the jury on bribery, 18 U.S.C. Section 201, and the Sixth Circuit's decision affirming the instruction is in direct conflict with the decision of the Courts of Appeal for the Fourth, Ninth and Tenth Circuits 13

II. The evidence was insufficient to sustain the verdicts returned by the jury based upon erroneous instructions on the crime of bribery, 18 U.S.C. Section 201 18

Conclusion 22

Appendix:

A. Opinion of the Court of Appeals A1
B. Judgment and Sentence Order A9
C. Order of the Court of Appeals Denying Petition for Rehearing A12
D. Indictment A13

TABLE OF AUTHORITIES

Cases

United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976) 14, 15, 18, 19
United States v. Eisner, 533 F.2d 987, 989 (6th Cir. 1976) 20
United States v. Enright, 579 F.2d 980 (6th Cir. 1978) 22
United States v. Grassi, 616 F.2d 1295, 1301 (5th Cir. 1980) 21
United States v. United States Gypsum Co., 438 U.S. 422 (1978) 21
United States v. Jennings, 471 F.2d 1310 (2d Cir. 1972) 16, 17, 21
United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980) 14, 15, 18, 21
United States v. Riley, 550 F.2d 233, 238 (5th Cir. 1977) 15
United States v. Strand, 574 F.2d 993 (9th Cir. 1978) 15-16, 18
United States v. VanFossen, 460 F.2d 38, 41 (4th Cir. 1972) 21
Woelfel v. United States, 237 F.2d 484, 488 (4th Cir. 1956) 14, 18

Statutes

18 U.S.C. Section 201 ..... *passim*
18 U.S.C. Section 371 ..... 2, 4
18 U.S.C. Section 1962 4
18 U.S.C. Section 1965 4
28 U.S.C. Section 1254 2

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OPINION BELOW

The original Opinion of the Sixth Circuit Court of Appeals in *United States v. Thomas Lanci and Anthony Liberatore,* Case Numbers 80-5239 and 80-5246, is appended hereto as Appendix A. The Opinion below relating to Petitioner was in Case Number 80-5246 and was filed on January 12, 1982. Said judgment became final on February 24, 1982, the date when Petitioner's application for rehearing was denied (Appendix C).

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming Petitioner's conviction was filed on January 12, 1982. A motion for rehearing was denied on February 24, 1982. The jurisdiction of this Court is being invoked pursuant to Title 28 United States Code, Section 1254(1), which provides review by Writ of Certiorari of all cases decided by the Court of Appeals. The Petitioner contends that the Opinion of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of the Courts of Appeal for the Fourth, Ninth and Tenth Circuits.

STATUTORY PROVISIONS INVOLVED

United States Code:

18 U.S.C. Section 371

Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 201(b) (3), (f), and (g)

Bribery of public officials and witnesses

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for

or because of any official act performed or to be performed by him—

> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

This is a Petition for Certiorari to review the judgment of conviction of the Petitioner, Anthony Liberatore, in the United States District Court for the Northern District of Ohio, Eastern Division. The Petitioner and others were charged in a four count indictment alleging violations of 18 U.S.C. Section 1965, Racketeer Influenced Corrupt Organizations Act; 18 U.S.C. Section 371, conspiracy; and 18 U.S.C. Section 201(b) (3), bribery (Appendix D). The Petitioner was found guilty by a jury on July 3, 1980 of conspiracy to bribe an employee of the Federal Bureau of Investigation (Count II), a violation of 18 U.S.C. Section 371, and of bribery of the same F.B.I. employee in violation of 18 U.S.C. Section 201(b) (3) (Count IV). Petitioner was acquitted of a similar substantive charge of bribery of this same F.B.I. employee (Count III).[1] The other defendants charged in the indictment were: James T. Licavoli and John P. Calandra, both acquitted of all counts by the jury; Thomas Lanci, convicted of Counts II and IV; Pasquale Cisternino and Ronald Carabbia, judgment of acquittal entered on all counts by the trial court; and, Kenneth Ciarcia, convicted of Counts II, III, and IV on his plea of guilty before trial.

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1. Count I of the indictment charged all of the above-named defendants under 18 U.S.C. Section 1962(d), conspiracy to violate the Racketeer Influenced and Corrupt Organization statute. This count was severed prior to trial and remains pending. As a result, Counts II, III, and IV were given to the jury as Counts I, II, and III. The counts will be referred to herein as they appear in the indictment.

The United States District Court for the Northern District of Ohio entered judgment on July 17, 1980 and sentenced Petitioner to five years custody on the conspiracy count and twelve years custody on the bribery count, the sentences to run concurrently (Appendix B).

The Petitioner susbequently appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed his conviction (Appendix A). From that affirmance Petitioner now seeks review of his conviction on certiorari to this Court.

STATEMENT OF FACTS

Count II of the indictment charged that from December, 1976 to March 9, 1978, the Petitioner, Anthony Liberatore, was part of a conspiracy with Thomas Lanci, Kenneth Ciarcia and six other charged and uncharged persons to corrruptly give things of value to Geraldine Rabinowitz, a clerk-typist in the Cleveland F.B.I. office, with the intent to induce Geraldine Rabinowitz to obtain confidential F.B.I. information and documents in violation of her lawful duties. Counts III and IV charged Petitioner, Lanci, Ciarcia, and four other persons with the substantive offenses of bribing Geraldine Rabinowitz in "June or July, 1977" and "October, 1977" respectively.

Based principally on the testimony of Geraldine Rabinowitz and her husband, Jeffrey Rabinowitz, the Government's trial theory was that the "things of value" that were corruptly given to Geraldine Rabinowitz took the form of promises of intervention in a civil lawsuit involving a land contract in which Geraldine Rabinowitz was a party-plaintiff, and the payments of $1,000 in June or July,

1977 (Count III) and $14,900 in October, 1977 (Count IV) (J. App., pp. 90-91, 722, 723).[2]

Testimony showed that in 1976, Defendant Ciarcia worked with Jeffrey Rabinowitz at Crossroads Lincoln Mercury, an automobile dealership. Geraldine Rabinowitz testified that at a Christmas party in December, 1976, Kenneth Ciarcia stated he would assist her with a lawsuit she then had pending (J. App., p. 170). Mrs. Rabinowitz then worked as a clerk-typist in the Cleveland Office of the Federal Bureau of Investigation. Mrs. Rabinowitz testified that she had many general discussions with Ciarcia about her lawsuit, but never specified the exact form of Ciarcia's offer of assistance. In the "spring of 1977," Ciarcia first asked Jeffrey Rabinowitz to have Mrs. Rabinowitz obtain information from F.B.I. files as to whether or not an active F.B.I. investigation existed on himself, James Licavoli, and Anthony Liberatore, the Petitioner (J. App., pp. 170-173). In May, 1977, after several additional discussions directly with Ciarcia concerning this initial request, Mrs. Rabinowitz checked the F.B.I. files and advised Ciarcia that no investigation of himself or Liberatore was pending, but that there was an active investigation of Licavoli. Ciarcia requested F.B.I. documents of this investigation and Mrs. Rabinowitz delivered the first set of documents concerning Licavoli, dated February 2, 1977.

Mrs. Rabinowitz delivered the February 2, 1977 Licavoli documents to Ciarcia at the house of his girlfriend, Noreen Orlowe, in late May, 1977, while Ciarcia's nephew, Thomas Lanci, was standing nearby (J. App., p. 179). After this Ciarcia stated that he and Lanci were leaving (J. App., pp. 181-185). Ciarcia returned alone and gave

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2. All references to J. App. are to the joint appendix filed in the Sixth Circuit Court of Appeals on behalf of Petitioner as an appellant under the deferred appendix method.

the documents back to Mrs. Rabinowitz in an unstapled condition (J. App., pp. 186-189).

Mrs. Rabinowitz's testimony as to the date and location of the first delivery conflicted sharply with the testimony of the former owner of Noreen Orlowe's house, Robert Huntley, who testified that he occupied that house continuously until June 29, 1977, when he sold it to Noreen Orlowe (J. App., pp. 614-618).

After delivery of the first documents in late May, 1977, Mrs. Rabinowitz testified she met the Petitioner, Anthony Liberatore, at the Orlowe residence. The introduction was made by Ciarcia. Some time later Ciarcia alone requested identification of F.B.I. informant numbers referred to in the purloined documents. In response to these requests, shortly before July 20, 1977, Mrs. Rabinowitz delivered a list of twelve informant names to Ciarcia at the Crossroads Lincoln Mercury dealership. Mrs. Rabinowitz testified that the Petitioner arrived and that she received $1,000 cash from the Petitioner for a down payment on a new house the Rabinowitzes had previously contracted to build. She did not consider this money as given in exchange for the informant list (J. App., p. 260). This $1,000 was the "thing of value" which formed the basis for Count III, for which all defendants were acquitted. A second informant list was prepared and delivered to Ciarcia sometime in August, 1977. By this time, the Federal Bureau of Investigation was aware that the Cleveland Office had a security leak and false informant lists were planted in an attempt to stop the flow of information. The second list contained fifty-six names of both real and fictitious informants. The testimony showed that the Petitioner was not present during any of the deliveries beginning in May, 1977, up to and including the last document delivery in September,

1977. Moreover, the Petitioner's name did not appear in any of the documents that were delivered (J. App., p. 427).

On October 12, 1977 at Noreen Orlowe's home, a meeting was held to discuss financing for the home on which the Rabinowitzes had begun construction. Mrs. Rabinowitz had lost her civil suit on her former house and the Rabinowitzes needed money to finance their new house inasmuch as they would not realize a sum of money they had expected to receive. The Rabinowitzes now found themselves without funds to make the down payment on their home already under construction. Mrs. Rabinowitz and her fiance, Jeffrey, went to the Orlowe residence to discuss financing with Judy Lanci, co-defendant Lanci's wife, who was a loan officer at a local bank (J. App., p. 279). The Petitioner arrived sometime after everyone else. A heated discussion ensued when the Rabinowitzes asked the Petitioner to loan them the money they needed. Both Rabinowitzes testified that the Petitioner finally agreed to loan them the money they needed and that he said he would not ask any favors of them for the money and that it would be given with "no strings" attached (J. App., pp. 261, 371). Mrs. Rabinowitz said she regarded the money as a loan to be repaid (J. App., pp. 245, 287-288).

When asked on direct examination by the Government's attorney as to her understanding of the nature of this money delivered to her, Mrs. Rabinowitz testified:

> Q. Mrs. Rabinowitz, do you remember a series of questions concerning the October 13, meeting and your receipt of approximately $15,000?
>
> A. Yes, sir.
>
> Q. In 1977, with reference to that date, what or how did you consider the $15,000?
>
> A. As a loan.

Q. You considered it as a loan?

A. Yes, sir.

Q. On the evening of that meeting, was there any discussion about your repayment of that $15,000?

A. Yes, sir.

Q. What was the substance of the discussion, if you recall?

* * * * *

A. Mr. Liberatore said that he expected to be repaid for the money (J. App., pp. 286-289).

Testimony was elicited as to the motivation behind Mrs. Rabinowitz's delivery of the subject confidential documents. The cross-examination of Mrs. Rabinowitz established her own perception of the reasons why she gave the confidential information and, separate and apart, why money was loaned to her. Specifically, she did not receive the money in exchange for the F.B.I. documents.

Q. So that when you got that money, it was not in exchange for that list, was it?

A. No, sir.

* * * * *

Q. And then during the course of that conversation, Mr. Liberatore told you that he would have to borrow some money, didn't he?

A. Yes, he did, sir.

Q. He told you, first, he said "There is no way in the world that I can come up with that kind of money"?

A. Yes, he did.

Q. And then he said he would go somewhere and borrow the money?

A. Yes, sir.

Q. That's exactly what he told you, isn't it?

A. Yes, sir.

* * * * *

Q. And he also told you that he was going to loan that money to you and your husband, didn't he?

A. Yes, sir, he did.

Q. *And he even told you that he wasn't going to be asking you for any favors or anything like that, but just pay it back after you sold your house; wasn't that the essence of what he told you?*

A. *Yes, sir.*

Q. So you regarded that as a loan, didn't you?

A. Yes, sir (J. App., pp. 259-260).

The Court of Appeals made a factual determination that Mrs. Rabinowitz did not consider either payment to be in exchange for the documents she took (Appendix A, p. 2).

As to actual repayment of the loan, Mrs. Rabinowitz testified that she endorsed a check she received from her insurance company for a ring she had purportedly lost and gave the check to Ciarcia (J. App., pp. 286-289). In addition, the Rabinowitzes had $3,000 to add to the insurance proceeds for repayment. Hence, terms of repayment were discussed and settled.

A. Okay. On the evening before, which would be October 12th, Mr. Liberatore I believe was figuring out how we could repay the loan.

We discussed where we would get the money to start to repay the $15,000.

THE COURT: I believe this was the subject on direct examination, as to what that discussion was.

Q. Was there any discussion as to when payments had to be made?

A. Well, as soon as the insurance check came in, they wanted repayment of that.

And when I received the check from my house, on the settlement of my house, they wanted the check for that.

* * * * *

Q. And when you were talking about the repayment of that money, he was calculating the return on the ring, the four thousand, four-one hundred dollar—

A. Yes, sir.

Q. —whatever I think he estimated it at; $5,000 didn't he?

A. Yes, sir.

Q. The $3,000 that you had?

A. Yes, sir.

Q. So that if those moneys had been realized, actually the loan would have been reduced to $7,000, wouldn't it?

A. Yes, sir (J. App., pp. 259-260).

Upon cross-examination, by use of prior testimony from another trial to impeach her in the present case,

Mrs. Rabinowitz admitted that no mention of money was made until long after the last of the F.B.I. documents was delivered (J. App., pp. 263-264).

Mrs. Rabinowitz testified that the "only thing discussed on October 12 or 13 . . . was the $15,000 loan" and, specifically, that the F.B.I. documents and information which she had previously furnished were not discussed (J. App., pp. 278-279). Mrs. Rabinowitz further testified that her only reason or motivation in obtaining the F.B.I. documents and information was pressure from her husband; she stated she had no other reason or "consideration" to supply the documents (J. App., pp. 267-269).

The Petitioner is alleged to have delivered the money the next day, however the testimony conflicts as to out of whose automobile the money was taken by Jeffrey Rabinowitz. The implication was that the Petitioner provided the money but this was not clearly established.

Harry Lum, owner of Crossroads Lincoln Mercury, testified that on March 8, 1978 he discovered a brown box or package in the conference room of his dealership, which box contained F.B.I. documents. He immediately turned the box over to F.B.I. agent George Grotz (J. App., pp. 389-394). Both Ciarcia and Jeffrey Rabinowitz worked at Crossroads as automobile salesmen. John Baldassarre, another Crossroads automobile salesman, testified that in December, 1977 at Ciarcia's request, he picked up a brown box at Noreen Orlowe's house and took it to Crossroads for later pick-up by Jeffrey Rabinowitz (J. App., pp. 562-563, 566-569, 577-578).

Agent Grotz identified the documents he received from Harry Lum as the F.B.I. documents and informant lists taken and compiled by Geraldine Rabinowitz (J. App., pp. 402-425). After an examination of the recovered doc-

uments, Geraldine Rabinowitz's handwriting was recognized and on March 9, 1978, she and her husband were arrested. The recovered documents contained the numerous fingerprints of Ciarcia, Lanci, Harry Lum, and John Baldassarre (J. App., pp. 435-436). The recovered documents contained only one thumbprint of the Petitioner.

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON BRIBERY, 18 U.S.C. SECTION 201, AND THE SIXTH CIRCUIT'S DECISION AFFIRMING THE INSTRUCTION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEAL FOR THE FOURTH, NINTH AND TENTH CIRCUITS.

(A)

Petitioner requested the jury be instructed that it must be proven that any offer, promise or giving of a thing of value to Geraldine Rabinowitz occurred prior to the violation of her lawful duty (J. App., pp. 711-714, 719, 721, 742). This instruction was refused and the court simply charged that it was necessary to prove the specific intent of a particular defendant to induce Geraldine Rabinowitz to violate her duty "existed contemporaneously" with the offer, promise or giving (J. App., pp. 737-738).

The court erred in refusing Petitioner's requested instruction and this error was not cured by the charge as given. The charge given was a correct statement of law as far as it went: there must be a concurrence of the specific intent to induce the official's action *and* the offer, promise or giving. But the concurrence must occur before,

or at least contemporaneously with, the violation of duty by the official—here the taking of F.B.I. information and documents.

The trial court observed that Count IV involving the $14,900 October 13th payment, made after Geraldine Rabinowitz had obtained the last documents and information, would still be satisfied if the money was given where "there had been a prior promise," or where "that payment could just as easily have been a combination paying for past documents delivered and in the *hope* they could still get some more." (J. App., pp. 711-712).

At least one case speaks to the proposition that Section 201(b)(3) is violated by a payment made after the official's action but pursuant to a prior promise. *Woelfel v. United States*, 237 F.2d 484, 488 (4th Cir. 1956). However, a payment made under some "hope" of ultimate benefit would not be sufficient. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976). It must be specifically contingent on future action. *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980).

Even if it could be inferred that the $14,900 October 13th payment was made pursuant to a prior promise, there was a lack of sufficient evidence that Petitioner was aware of Ciarcia's conversations and offers of assistance with respect to the civil lawsuit. Under the evidence, this had to constitute the source of any prior promise, if one existed.

There was persuasive evidence that the $14,900 was given solely for *past* acts in obtaining the documents and information. The money was given several weeks after Mrs. Rabinowitz had taken the last document. Nothing was said by anyone either on October 12th or 13th to suggest that future services were expected in return for the money; in

fact, both Rabinowitzes testified that Petitioner stated he would not ask any favors for the money and "no strings" were attached (J. App., pp. 261, 266, 371). Mrs. Rabinowitz testified that it was clear to her that Petitioner expected nothing in return and she considered the money a loan to be repaid (J. App., pp. 245, 266, 287, 288). Her husband acknowledged that "money" only became a factor *after* all of the documents were delivered, and they both confirmed that the pressure exerted by Jeffrey Rabinowitz was responsible for Mrs. Rabinowitz's actions (J. App., pp. 267-268, 269, 366-370).

Petitioner's right to advance these facts as a theory of defense under appropriate instructions was foreclosed by the trial court's refusal to give his requested instruction. *United States v. Riley*, 550 F.2d 233, 238 (5th Cir. 1977). A thing of value as consideration for a bribe must be given prior to the action by a public official. Recently in a Section 201(b)(1) case, the Tenth Circuit comprehensively stated the requirements for a bribe:

> To establish the crime of offering a bribe under §201 (b)(1), the government must show that the money was knowingly offered to an official with the intent and expectation that *in exchange for the money*, some act of a public official would be influenced. The money must be given with more than 'some generalized hope or expectation of ultimate benefit on the part of the donor.' *United States v. Arthur*, 544 F.2d at 734. The money must be offered, in other words, with the intent and design to influence official action in *exchange for the donation. United States v. Johnson, supra*, at 1076 (emphasis added).

Other cases confirm that the thing of value under Section 201 must be given for future acts. See *United States v. Arthur, supra; United States v. Strand*, 574 F.2d 993, 995

(9th Cir. 1978). A *fortiori*, it must be given prior to the official's action. A thing of value in consideration of past acts is a gratuity. 18 U.S.C. Section 201(f)(g).

Failure to give the requested charge was also prejudicial to Petitioner as to the conspiracy count. The evidence showed that the only statements he made to the Rabinowitzes was that he allegedly thanked them for certain information. Petitioner could not agree on October 12th to violate Section 201(b)(3) with persons that themselves lacked the required intent to give a thing of value contingent on future acts. Moreover, if the $14,900 was given under a prior promise, there was no evidence Petitioner was aware of it. One may join a conspiracy already in progress, but one must know, or have reason to know, the object of the conspiracy and have the required intent for the substantive crime. Indeed, Petitioner heatedly objected to the suggestion that he give or loan any money to the Rabinowitzes.

(B)

Petitioner also requested an instruction that it must be proven that he had knowledge that "Geraldine Rabinowitz was a public official with some authority to act." This request was refused (J. App., pp. 705-706, 714-716, 742). In *United States v. Jennings*, 471 F.2d 1310 (2d Cir. 1972), the trial court refused an instruction offered by the defendant that to sustain a Section 201(b)(1) violation he must be shown to have knowledge that the persons he attempted to pay $400 to protect his gambling operation were in fact F.B.I. agents. The Second Circuit upheld the conviction but noted that it was still necessary that the defendant be shown to have understood and believed that the F.B.I. agents had authority to avoid arresting him in connection with his gambling operations. The court stated:

> In short, culpability turns upon the defendant's knowledge or belief that the person whom he attempts to bribe is an official having authority to act in a certain manner and not on whether the official possesses federal rather than state authority. *Jennings* at 1313.

It was error for the trial court to deny the Petitioner an opportunity to present this defense to the jury under an appropriate instruction. There was no testimony that Geraldine Rabinowitz was identified or described as an F.B.I. employee to Petitioner. Although Petitioner's one thumbprint was later found on the documents, it can hardly be said this provides the knowledge element as to Mrs. Rabinowitz's employment. Indeed, the opposite inference should be drawn by the lack of Petitioner's fingerprints on these documents as compared to those of co-defendants Ciarcia and Lanci. Many other fingerprints of persons not indicted and not connected with the F.B.I. were also found on the recovered documents (J. App., pp. 435-436). The fact that these documents were identifiable as F.B.I. documents does not foreclose the equally permissible inference that one may come into contact with such documents through a variety of legitimate means (J. App., pp. 139-141). Hence, Petitioner had a right to present a rational argument to the jury that he did not know of Mrs. Rabinowitz's status as an F.B.I. employee.

The Court of Appeals summarily found that the jury ". . . could infer that the payments were made for stolen materials." However, that presumes a prior agreement to receive a definite benefit from Petitioner and his co-defendants. Such is simply not the case as demonstrated by the vague hopes of benefits testified to by the Rabinowitzes and the specific testimony that the money was given long after the documents were delivered and without a prior agreement to receive anything for the documents.

Hence, the Sixth Circuit first assumes facts contrary to the evidence and then ignores the holdings of the Tenth Circuit in *United States v. Johnson, supra.* The result is a conflict with precedent established by the other various circuits.

II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICTS RETURNED BY THE JURY BASED UPON ERRONEOUS INSTRUCTIONS ON THE CRIME OF BRIBERY, 18 U.S.C. SECTION 201.

(A)

Count IV charged that Petitioner participated in giving a thing of value to Geraldine Rabinowitz "in or about October, 1977." The evidence as well as the Government's trial theory established that the thing of value charged in Count IV was $14,900 given to the Rabinowitzes on October 13, 1977, "in return for the favors she [Mrs. Rabinowitz] did for the defendants by turning over this information from the Federal Bureau of Investigation." (J. App., pp. 90-91).

There was not "substantial and competent" evidence introduced that the $14,900 was given to Geraldine Rabinowitz with a specific intent to induce her to wrongfully obtain F.B.I. information *after* October 12th or 13th. In order to violate Section 201(b)(3), the giving of a thing of value to a public official must be conditioned on future wrongful action by the official. See *United States v. Johnson, supra,* at 1076; and *United States v. Arthur, supra,* at 734. This requirement of a *quid pro quo* for bribery was recognized early in *Woefel v. United States, supra,* at 488. See also *United States v. Strand, supra,* at 995. The legislative scheme of Section 201 clearly indicates a congres-

sional intent that subsections (b) and (c) apply to "future acts" while payments to public officials for past acts are covered by subsections (f) and (g).

Rather than establishing that the $14,900 was paid contingent on future action by Geraldine Rabinowitz, the evidence was quite the contrary. The money was given several weeks after the last information was delivered, i.e., the August 24, 1977 Licavoli documents given to Ciarcia in early September, 1977 (J. App., pp. 218-219, 262). According to the testimony, nothing was said by any of the participants on either October 12th, when the $14,900 was discussed, or on October 13th, when it was delivered, to infer that future action was expected of Mrs. Rabinowitz in regard to obtaining further F.B.I. information (J. App., pp. 240-248, 261, 317-335). Both Rabinowitzes testified that Petitioner stated that he would not ask any favors for the money, that he was only interested in its repayment, and that it was given with "no strings" attached (J. App., pp. 261, 371). Mrs. Rabinowitz testified that she believed Petitioner expected nothing in return and that she regarded the money as a loan to be repaid (J. App., pp. 245, 266, 287-288). Jeffrey Rabinowitz testified that it was not until after all of the documents were delivered that he decided to ask for money (J. App., pp. 368-373).

The evidence that Ciarcia made two requests of the Rabinowitzes for F.B.I. information after October 13th cannot serve to bootstrap the lack of specific *quid pro quo* evidence at the time the $14,900 was given. Money given under "some generalized hope or expectation of ultimate benefit on the part of the donor" is insufficient. *United States v. Arthur, supra,* at 734. Substantial evidence was required for reasonable minds to find beyond a reasonable doubt that at the time the money was given, it was con-

tingent on future action. See *United States v. Eisner,* 533 F.2d 987, 989 (6th Cir. 1976) (sufficiency of evidence tests).

(B)

There was insufficient evidence to support the verdict under Count II for reasonable minds to conclude beyond a reasonable doubt that Petitioner joined a conspiracy with a specific intent to give things of value to Geraldine Rabinowitz *for the purpose* of inducing her to obtain F.B.I. documents and information. Under the Government's theory, the offer of assistance with respect to the civil lawsuit was the initial "thing of value" given to induce theft of the documents. There was no evidence that Petitioner had knowledge of Ciarcia's offer. Moreover, Petitioner's name did not appeal in any of the recovered F.B.I. documents and there was no evidence that he was aware that Geraldine Rabinowitz was an F.B.I. employee or a public official with some authority to act (J. App., p. 427).

The evidence against Petitioner included Mrs. Rabinowitz's testimony that he was never present when she delivered any Licavoli documents to Ciarcia. There was no direct testimony that Petitioner was aware of the nature of the documents, or more importantly, that Ciarcia promised assistance with a lawsuit to obtain them. Mere presence in the company of conspirators is of slight probative value.

Although Petitioner was also present on October 12, 1977, Geraldine Rabinowitz testified that the previously furnished documents and information were not discussed (J. App., pp. 278-279). There was no evidence that, at this time, Petitioner was aware of what had previously transpired with respect to the civil lawsuit or Rabinowitz's previous home building arrangements.

The gravamen of bribery under Section 201(b)(3) is not simply that things of value are given to a public official, but rather that they are offered, promised or given for the purpose of inducing a violation of lawful duty or, to put it another way, "with the intent and expectation that, *in exchange* for the money, some act of a public official would be influenced." (Emphasis added). *United States v. Johnson, supra,* at 1076. This critical element can also be seen underlying the further requirement that the donor be aware that the person he has given the thing of value to is "an official having authority to act in a certain manner." *United States v. Jennings, supra.*

These same specific intent and knowledge requirements apply as well to a person charged with conspiracy. To convict one charged with conspiracy to violate a substantive statute, he must be shown to have had the same degree of intent required for the substantive offense. *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978). One does not become a co-conspirator simply by virtue of knowledge of a conspiracy and association with conspirators; rather, it is the agreement to engage in the unlawful activity. *United States v. Grassi,* 616 F.2d 1295, 1301 (5th Cir. 1980). Petitioner's awareness of the $15,000 Rabinowitz request and the $14,900 payment do not supply the required specific intent. Nor was the *mens rea* requirements of Section 201(b)(3) supplied by the fingerprint evidence. It did not constitute substantial proof that the Petitioner knew *how* the documents were obtained or *when* he came into contact with them. *United States v. VanFossen,* 460 F.2d 38, 41 (4th Cir. 1972).

The failure of proof on the critical intent element did not satisfy a preponderance test, and accordingly, the trial court erred in allowing, over objection, the co-conspirator hearsay statements made by Ciarcia to the Rabinowitzes

(J. App., pp. 92-94, 208, 224, 315, 501-503). See *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978).

For the foregoing reasons, the trial court erred in failing to grant Petitioner's motion for a judgment of acquittal on Counts II and IV (J. App., pp. 504-513, 514-515, 702-703).

CONCLUSION

For all the foregoing reasons, Petitioner prays that this Court grant certiorari to review his convictions.

Respectfully submitted,

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Cleveland, Ohio 44114
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Counsel for Petitioner

Appendix

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Decided and Filed January 12, 1982)

No. 80-5239
No. 80-5246

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS LANCI (80-5239) and
ANTHONY LIBERATORE (80-5246),
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO.

Before: WEICK and LIVELY, *Circuit Judges;* and PHILLIPS, *Senior Circuit Judge.*

LIVELY, *Circuit Judge.* The defendants appeal from their jury convictions of one count of conspiracy and one count each of bribery of an FBI employee, in violation of 18 U.S.C. §§ 201(b)(3)[1] and 371. There was evidence

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1. 18 U.S.C. § 201(b)(3) provides:

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official, or person who has been selected to be a public official, or

(Continued on following page)

that a co-defendant, Kenneth Ciarcia, who pled guilty to all present charges shortly prior to trial, had induced a clerical employee of the Cleveland office of the FBI, Gerri Rabinowitz, to divulge to him confidential information from FBI files, including two lists of FBI informants. Ms. Rabinowitz who pled guilty to charges of bribery, received $1,000 on one occasion and $14,900 on another, both from the defendant Liberatore. The defendant Lanci was present on the second occasion and took part in discussions concerning Ms. Rabinowitz's need for $15,000 in connection with the purchase of a home. Lanci suggested that Liberatore lend her the money. There was no promissory note to evidence a loan. The money was carried in a brown paper bag which was delivered by Liberatore to Ms. Rabinowitz.

Some months after the exchange of the $14,900 a box of FBI documents (or copies thereof) was discovered on the premises of an automobile agency where both Ciarcia and Ms. Rabinowitz's husband worked. The FBI materials were the documents which Ms. Rabinowitz had purloined, and their discovery led to her arrest, confession and conviction. Ms. Rabinowitz testified that she did not consider either the $1,000 or the $14,900 payments as having been given in exchange for the information which she took from the FBI files.

Footnote continued—

> offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> * * *
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, * * *

A.

On appeal the defendant Liberatore made four arguments as follows:

ARGUMENT NO. I:

The court erred in finding a conspiracy existed that included this defendant and one James Licavoli, which determination was essential to the admission of certain prejudicial testimony provided by the witness Fratianno.

ARGUMENT NO. II:

The court erred or abused his discretion in redacting virtually the entirety of the contents of various documents admitted as evidence, particularly the so-called FBI informant's list, which documents and list were submitted to the jury as those stolen and supposedly sold by the FBI clerk to this appellant and others.

ARGUMENT NO. III:

The court erred in its charge to the jury as to the elements of the substantive offense of bribery, as charged herein.

ARGUMENT NO. IV:

There is insufficient evidence to support a finding of guilt beyond a reasonable doubt.

There was evidence from which the district court could find that James Licavoli was a member of a conspiracy which included Liberatore. Since this was so the witness Fratianno was properly permitted to relate statements of Licavoli concerning Liberatore under the

co-conspirator exception to the hearsay rule. Rule 801(d)(2), Fed. R. Evid.

As to the second argument, we conclude that the district court did not abuse its discretion in removing the names of informants from the list provided by Ms. Rabinowitz. The court found that the lives of informants might be endangered by further dissemination of their names. The district court conducted the required balancing of interests in reaching its decision on this issue. See *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

We find no merit in the third and fourth arguments. Viewing the court's instruction on the bribery charge as a whole we find that the jury was properly charged on the elements of the offense. The contention that the evidence was insufficient to support conviction is based on the defense that the payments to the FBI employee were not made in return for her agreement to provide, and actually providing, confidential information. The jury was not required to believe such testimony, but could infer that the payments were made for the stolen materials. When viewed in the light most favorable to the government, as it must be following conviction, *Glasser v. United States*, 315 U.S. 60 (1942), the evidence was clearly sufficient to support a finding beyond a reasonable doubt of Liberatore's guilt.

B.

The defendant Lanci presented his argument in the form of five issues:

I. WHETHER APPELLANT-DEFENDANT, THOMAS LANCI, WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S EXCLUSION OF EXCULPATORY EVIDENCE AND/OR FAILURE TO GRANT A SEVERANCE

II. WHETHER THE DISTRICT COURT ERRED IN ITS CHARGE TO THE JURY

III. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE JURY VERDICTS ON COUNTS II AND IV

IV. WHETHER THE EIGHT YEAR SENTENCE IMPOSED ON LANCI VIOLATED THE DOUBLE JEOPARDY PROHIBITION AGAINST MULTIPLE PUNISHMENTS FOR THE SAME ACT

V. WHETHER THE DISTRICT COURT LACKED JURISDICTION AFTER APPELLANT LANCI FILED A NOTICE OF APPEAL

Most of these arguments do not require extended discussion. Though the evidence did not place him at the center of the conspiracy or show his involvement in the actual payment as clearly as Liberatore's, it was sufficient to support the jury's verdict finding Lanci guilty. He was present during the discussion of the $15,000 payment and actually suggested the loan device. His fingerprints were found on a number of the stolen FBI documents. Furthermore, several of the requests by co-defendant Ciarcia for FBI information related to Lanci. The fact that the final payment was made after the last delivery of FBI documents is immaterial. The jury could infer that the payment was made then in carrying out an earlier agreement to pay when the information had been delivered.

As with Liberatore, there is no merit to Lanci's assertion that the jury charge was either inadequate or erroneous. Further, the sentence imposed on Lanci did not violate the constitutional prohibition against double jeopardy. *United States v. Austin*, 529 F.2d 559 (6th Cir. 1976), is distinguishable. Each of the offenses for which Lanci was sentenced in the present case required proof

of at least one element not required for conviction of the other. *Blockburger v. United States*, 284 U.S. 299 (1932).

When the present cases were set for trial, all defendants took an interlocutory appeal to this court from the district court's denial of their motions to dismiss the indictment on double jeopardy grounds. *Abney v. United States*, 431 U.S. 651 (1977). Their claim was based on the fact that the State of Ohio had previously prosecuted the defendants for some of the same acts which are the basis of the charges in the present case. This court found no double jeopardy, applying the "dual sovereignty" doctrine in an unpublished order. *United States v. Lanci, et al.*, (Nos. 79-5362, 79-5373, 79-5374, 80-5006, 80-5007, 80-5008, 80-5017 and 80-5018, decided and filed July 11, 1980). During the pendency of the interlocutory appeal the district court reinstated the counts which are the basis of the convictions from which the present appeal was taken and proceeded with the trial. We conclude that the district court had jurisdiction to proceed, having determined that the interlocutory appeal lacked any "colorable foundation." See *United States v. Leppo*, 634 F.2d 101 (3d Cir. 1980), *cert. denied*, 50 U.S.L.W. 3351 (Nov. 2, 1981); *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926 (1980).

The claim that Lanci was denied a fair trial by exclusion of exculpatory evidence relates to testimony of the co-defendant Ciarcia given at his earlier state trial for murder. Ciarcia exercised his constitutional right not to testify at the trial of Lanci because a charge was still pending against him. Thus the district court ruled that Ciarcia was unavailable as a witness but excluded the evidence on the ground that it would prejudice the rights of other co-defendants. In the state court testimony which Lanci proffered Ciarcia said that he "imagine[d]" Lanci's

fingerprints appeared on the FBI documents because of Lanci's curiosity about the documents. Ciarcia testified that he didn't know whether Lanci "read them [the documents] or glanced through them or what."

On appeal Lanci contends that the Ciarcia testimony would have explained the presence of his fingerprints on the FBI documents, and that it was reversible error to exclude it. He relies on Rule 804(b)(1), (3) and (5). Since the United States was not a party to the murder prosecution and the State of Ohio had no "similar motive" to develop the facts concerning the bribery of an FBI employee, Rule 804(b)(1) does not apply. Though the evidence came within the hearsay exception of Rule 804 (b)(3) as a statement against interest, Ciarcia's testimony was so uncertain that it was inadmissible for lack of competency. What a person who does not claim to know the facts may imagine or guess the facts to have been is never admissible. Rule 602, Fed. R. Evid., provides in part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

The hearsay exception of Rule 804(b)(3) is subject to the requirement of Rule 602. In *United States v. Lang*, 589 F.2d 92, 97-98 (2d Cir. 1978), the court dealt with this issue as follows:

> Despite our holding that Carey was an unavailable witness and that his statement was against penal interest within Rule 804(b)(3), we nonetheless hold that the admission of the tape constituted error requiring a reversal of the conviction. Although that Rule does not expressly incorporate a requirement that the declarant have personal knowledge of the

facts to which his statement relates, Fed.R.Evid. 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." The Advisory Committee Note to Rule 803 specifically provides:

> In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

This requirement of firsthand knowledge has "always been inherent in the statement against interest exception . . . and is assured by Rule 602." 4 Weinstein's Evidence ¶ 804(b)(3)[02] (1977); accord, McCormick, Evidence §§ 10, 276 (1972); V. Wigmore, Evidence § 1471(a) (Chadbourn rev. 1974).

There was no error in excluding the proffered testimony of Ciarcia from the jury's consideration.

On the entire record we conclude that the defendants received a fair trial and that no prejudicial errors occurred in the district court proceedings.

The judgments of conviction are affirmed.

APPENDIX B

Judgment and Sentence Order of the United States District Court

(Dated July 17, 1980)

UNITED STATES DISTRICT COURT
N. D. OHIO, EASTERN DIVISION
Docket No. CR79-103

UNITED STATES OF AMERICA

vs.

ANTHONY LIBERATORE
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date (Month) 07 (Day) 17 (Year) 81

COUNSEL

[ ] Without Counsel

However the court advised defendant of right to counsel and asked whether defendant desires to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] With Counsel

Elmer Giuliani, Clarence Rogers, Jr. and Mark DeVan.
(Name of counsel)

PLEA

[ ] Guilty, and the court being satisfied that there is a factual basis for the plea,

[ ] Nolo Contendere.

[X] Not Guilty

There being verdict of ([ ]Not Guilty. Defendant is discharged [X] Guilty.)

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of Conspiracy, in violation of T. 18, Sec. 371, U.S.C., as charged in Count II of the Indictment and Bribery of a Public Official, in violation of T. 18, Sec. 201(b)(3), U.S.C., as charged in Count IV of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the court was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWELVE (12) years on Count IV of the Indictment, pursuant to T. 18, Sec. 4205(a), U.S.C.

SENTENCE OR PROBATION ORDER

IT IS FURTHER ORDERED that defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) years on Count II of the Indictment, pursuant to T. 18, Sec. 4205(a), to run concurrently with the sen-

tence imposed on Count IV for a TOTAL sentence of TWELVE (12) years, pursuant to T. 18, Sec. 4205(a), U.S.C.

IT IS FURTHER ORDERED that the execution of sentence is hereby stayed pending determination of any appeal filed by the defendant.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant shall report weekly to the Probation Department during the pendency of any appeal of this judgment, as a condition of defendant's appeal bond.

IT IS FURTHER ORDERED that Count I of the Indictment remains pending.

* * * * *

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

/s/ WILLIAM K. THOMAS
WILLIAM K. THOMAS,
U.S.D.C. JUDGE

APPENDIX C

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing

(Filed February 24, 1982)

No. 80-5246

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY LIBERATORE,
Defendant-Appellant.

ORDER

BEFORE: LIVELY, *Circuit Judge;* WEICK* and PHILLIPS, *Senior Circuit Judges.*

No judge in regular active service on the court having requested en banc consideration of the petition for rehearing filed herein by the defendant-appellant Anthony Liberatore, the petition for rehearing has been referred to the hearing panel, Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the original submission and decision of this appeal and rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

*Judge Weick retired from regular active service under the provisions of 28 U.S.C. §371(b) on December 31, 1981 and became a senior circuit judge.

APPENDIX D

Indictment

Criminal Number CR78-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI, a/k/a "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, a/k/a "Butchie"; RONALD CARABBIA; THOMAS LANCI; KENNETH CIARCIA;
Defendants.

Violations: T. 18, U.S.C. §§ 1962(d), 1963, 371 & 201(b)(3)

INDICTMENT

The Grand Jury charges that:

Count I

1. From in or about May, 1976, and continuing thereafter up to and including on or about March 3, 1978, in the Northern District of Ohio, Eastern Division, and elsewhere, JAMES T. LICAVOLI, also known as "Jack White", ANTHONY LIBERATORE, JOHN P. CALANDRA, PASQUALE CISTERNINO, also known as "Butchie", RONALD CARABBIA, THOMAS LANCI, and KENNETH CIARCIA,

defendants herein and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as co-conspirators but not as defendants, unlawfully, willfully, and knowingly, did combine, conspire, confederate, and agree together, with each other, and with other persons unknown to the Grand Jury to commit an offense against the United States; that is, to violate Title 18, United States Code, § 1962(d).

2. It was a part of said conspiracy that JAMES T. LICAVOLI, also known as "Jack White", ANTHONY LIBERATORE, JOHN P. CALANDRA, PASQUALE CISTERNINO, also known as "Butchie", RONALD CARABBIA, THOMAS LANCI, and KENNETH CIARCIA, the defendants herein, and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony" named herein as coconspirators, but not as defendants, being associated with an enterprise engaged in and the activities of which affected interstate commerce, that is, a group of individuals associated in fact to control the criminal activities in various cities in the Northern District of Ohio, by means of murder, bribery, and other activities, would unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, including murder, conspiracy to murder, and bribery as defined in Title 18, United States Code, Sections 1961(1)(A), 1961(1)(B), and 1961(5), and as hereinafter further described.

3. It was further a part of said conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack

White"; ANTHONY LIBERTORE; and JOHN P. CALANDRA; and Anthony Delsanter, also known as "Tony the Dope", named herein as a coconspirator, but not as a defendant, would engage in the commission, carrying on and supervising of criminal activity in various cities in the Northern District of Ohio and receive monies as a result of such activity.

4. It was further a part of said conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA; and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic" and Louis J. Aratari, also known as "Tony", named herein as coconspirators, but not as defendants, would commit, carry on, and supervise, criminal activity in various cities in the Northern District of Ohio by use of acts and threats involving murder.

5. It was further a part of the conspiracy that the defendants, the unindicted coconspirators, and other persons would intercept wire communications, to wit, telephone conversations, of one Daniel J. Greene for the purpose of learning the planned whereabouts of Greene, and did use said tape recordings in order to locate Greene.

6. It was further a part of the conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; THOMAS LANCI; and KENNETH CIARCIA, would corruptly give and loan and promise to give and loan things of value, including approximately $15,900, more or less, to Geraldine M. Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Inves-

tigation of the United States Department of Justice in return for confidential information contained in the official files and records of the Federal Bureau of Investigation.

7. It was further a part of said conspiracy that Raymond William Ferritto, named herein as a coconspirator but not as a defendant, would travel from the State of Pennsylvania to the Northern District of Ohio.

8. In furtherance of said conspiracy and to effectuate the objects thereof, the defendants and others committed the following acts and pattern of racketeering:

a. That from in or about June, 1976, up to and including on or about May 17, 1977, in the Northern District of Ohio, and elsewhere the defendants, JAMES T. LICAVOLI, also known as "Jack White"; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; and RONALD CARABBIA; and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", and Raymond William Ferritto, named herein as coconspirators but not as defendants, conspired to murder one John Nardi, in violation of Ohio Revised Code, § 2923.01, a felony punishable by imprisonment of more than one year.

b. From in or about June, 1976, up to and including on or about October 6, 1977, in the Northern District of Ohio, and elsewhere, defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A.

Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as coconspirators but not as defendants, conspired to murder one Daniel J. Greene, in violation of Ohio Revised Code, § 2923.01, a felony punishable by imprisonment of more than one year.

c. On or about October 6, 1977, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA; and Raymond William Ferritto, Aladena T. Fratianno, also known as "Jimmy Fratianno", Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as coconspirators but not as defendants, did murder and aid and abet in the murder of Daniel J. Greene by means of an explosive device in violation of Ohio Revised Code, § 2903.01.

d. In or about June or July, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA corruptly did, directly and indirectly, give things of value, including approximately $1,000, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in the official files and records of the Federal Bureau of

Investigation, in violation of Title 18, United States Code, Section 201(b)(3).

e. In or about October, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA corruptly did, directly and indirectly, give things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 201(b)(3).

9. The respective interests of defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA in the assets of the previously described group associated in fact, constitute the present form of an enterprise the defendants conspired to conduct and participate in, directly and indirectly, in violation of Title 18, United States Code, § 1962(d), and are to their full extents subject to forfeiture to the United States of America under the provisions of Title 18, United States Code, § 1963(a).

All in violation of Title 18, United States Code, §§ 1962(d) and 1963.

The Grand Jury further charges that:

Count II

1. From in or about December, 1976, and continuously thereafter, up to and including the 9th day of March, 1978, in the Northern District of Ohio, Eastern Division, and elsewhere, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, defendants herein, and Anthony Delsanter, also known as "Tony the Dope" and Raymond William Ferritto, named herein as coconspirators but not defendants, willfully and knowingly did combine, conspire, confederate, and agree together, with each other, and with diverse other persons to the Grand Jury unknown to commit an offense against the United States; that is, to corruptly, directly and indirectly, give things of value to Jeffrey Rabinowitz, also known as Jeffrey Rabin, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 201(b)(3); and to defraud the United States by depriving the Federal Bureau of Investigation of the United States Department of Justice of and concerning its right to have its employees free to transact the official business of the United States unhindered, unhampered, unobstructed, and unimpaired by the exertion upon them of dishonest, corrupt, unlawful, improper, and undue pressure and influence.

2. It was a part of the conspiracy that the defendants would ask Geraldine Rabinowitz, also known as Geraldine Linhart, to use her position with the Federal Bureau of Investigation in order to obtain confidential information concerning defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; THOMAS LANCI; KENNETH CIARCIA and other persons; that the defendants did receive such confidential information from Geraldine Rabinowitz, also known as Geraldine Linhart; and that the defendants agreed to give and did give things of value to Geraldine Rabinowitz, also known as Geraldine Linhart in return for said confidential information.

3. It was further a part of the conspiracy that the defendants would exchange the information obtained from Geraldine Rabinowitz, also known as Geraldine Linhart among themselves and with other persons.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and coconspirators performed the following overt acts in the Northern District of Ohio, Eastern Division:

1. In or about December, 1976, KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart, and Jeffrey Rabinowitz, also known as Jeffrey Rabin.

2. In or about the Spring of 1977, Geraldine Rabinowitz, also known as Geraldine Linhart and Jeffrey Rabinowitz, also known as Jeffrey Rabin met with KENNETH CIARCIA and turned over to CIARCIA an official report of the Federal Bureau of Investigation concerning JAMES T. LICAVOLI, also known as "Jack White".

3. In or about June, 1977, ANTHONY LIBERATORE and KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart and loaned her $1,000.

4. In or about July or August, 1977, JAMES T. LICAVOLI, also known as "Jack White", and Anthony Delsanter, also known as "Tony the Dope", met with Raymond William Ferritto in Warren, Ohio.

5. Between on or about the 2nd day of August, 1977, and on or about the 6th day of August, 1977, JAMES T. LICAVOLI, also known as "Jack White", had in his possession a copy of portions of a report of the Federal Bureau of Investigation previously supplied to KENNETH CIARCIA by Geraldine Rabinowitz, also known as Geraldine Linhart.

6. In or about August or September, 1977, JOHN CALANDRA and PASQUALE CISTERNINO, also known as "Butchie" met with Raymond William Ferritto.

7. On or about the 24th day of September, 1977, ANTHONY LIBERATORE met with Geraldine Rabinowitz, also known as Geraldine Linhart.

8. On or about the 13th day of October, 1977, ANTHONY LIBERATORE, THOMAS LANCI, and KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart and Jeffrey Rabinowitz, also known as Jeffrey Rabin and gave and loaned them approximately $15,000, more or less.

9. Between in or about August, 1977, and the 5th day of December, 1977, JOHN P. CALANDRA had in his possession a portion of a report of the Federal Bureau of Investigation previously supplied to KENNETH CIARCIA by Geraldine Rabinowitz, also known as Geraldine Linhart.

10. In or about February, 1978, ANTHONY LIBERATORE met with Geraldine Rabinowitz, also known as Geraldine Linhart.

All in violation of Title 18, United States Code, Section 371.

The Grand Jury further charges that:

COUNT III

In or about June or July, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, Eastern Division, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, the defendants herein, corruptly did, directly and indirectly, give, offer and promise, things of value, to Jeffrey Rabinowitz, also known as Jeffrey Rabin, named herein as a co-accomplice but not as a defendant, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation.

All in violation of Title 18, United States Code, Section 201(b)(3).

The Grand Jury further charges that:

COUNT IV

In or about October, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio,

Eastern Division, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, the defendants herein, corruptly did, directly and indirectly, give, offer and promise, things of value, to Jeffrey Rabinowitz, also known as Jeffrey Rabin, named herein as a co-accomplice but not as a defendant, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart, to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation.

All in violation of Title 18, United States Code, Section 201(b)(3).

This is a True Bill.

.....

FOREMAN

/s/ JAMES R. WILLIAMS
JAMES R. WILLIAMS
United States Attorney
Northern District of Ohio

/s/ STEVEN R. OLAH
STEVEN R. OLAH
Special Attorney
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Opposition

Office - Supreme Court, U.S.
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No. 81-1968

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY LIBERATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the elements of bribery under 18 U.S.C. 201(b)(3).

2. Whether the evidence was sufficient to sustain petitioner's conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

United States v. *Arroyo*, 581 F.2d 649, cert. denied, 439 U.S. 1069	9
United States v. *Arthur*, 544 F.2d 730	10
United States v. *Brewster*, 408 U.S. 501	10
United States v. *Jennings*, 471 F.2d 1310, cert. denied, 411 U.S. 935	11-12
United States v. *Johnson*, 621 F.2d 1073	11
United States v. *Strand*, 574 F.2d 993	10-11
Woelfel v. *United States*, 237 F.2d 484	9

Statutes:

18 U.S.C. 201(b)(1)	12
18 U.S.C. 201(b)(3)	2, 8, 9, 12
18 U.S.C. 371	2
18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 669 F.2d 391.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1982. A petition for rehearing was denied on February 24, 1982 (Pet. App. A12). The petition for a writ of certiorari was filed on April 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiracy and one substantive count of bribery of an FBI employee, in violation of 18 U.S.C. 371 and 201(b)(3).[1] He was sentenced to five years' imprisonment on the conspiracy count and 12 years' imprisonment on the bribery count, to be served concurrently (Pet. App. A9-A11). The court of appeals affirmed (Pet. App. A1-A8).

1. The evidence at trial showed that petitioner, along with co-defendants Thomas Lanci and Kenneth Ciarcia, induced Geraldine Rabinowitz, a clerk in the Cleveland, Ohio, office of the FBI, to reveal confidential documents from the FBI, including lists of informants' names, in return for approximately $15,000 and assistance in a civil lawsuit in which she was involved.

Ciarcia initiated the requests for documents from Mrs. Rabinowitz ("Gerri"). They met through Gerri's husband, Jeffrey, who worked with Ciarcia

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[1] Co-defendant Thomas Lanci was convicted on the same counts at trial. Lanci was sentenced to eight years' imprisonment. Both were acquitted on an additional substantive bribery count. Two co-defendants, Pasquale Cisternino and Ronald Carabbia, were acquitted by the trial court at the close of the government's case. Co-defendant John P. Calandra was acquitted by the court at the close of all the evidence. Co-defendant James T. Licavoli was acquitted by the jury. Kenneth Ciarcia, a sixth co-defendant, pleaded guilty to all three counts prior to trial. He was sentenced to nine years' imprisonment. An additional count, charging a RICO conspiracy (18 U.S.C. 1962(c) and (d)) against all defendants, was severed prior to trial. Trial on that count is currently in progress.

at a Cleveland area automobile dealership. In December 1976, Ciarcia and the Rabinowitzes discussed problems Gerri was having in recovering possession of a house she owned as a result of a prior divorce settlement (C.A. App. 164-168, 308, 311-312).[2] Ciarcia assured Gerri that the case would be taken care of (*id.* at 169-170, 315-316).

In the spring of 1977, Ciarcia asked Gerri to find out whether he, co-defendant Licavoli, or petitioner were the subjects of FBI investigations (C.A. App. 171-173). Gerri said she could not reveal such information, but after receiving further assurances about her lawsuit she agreed to think about providing the information. Jeffrey Rabinowitz relayed to his wife Ciarcia's subsequent requests for this information (*id.* at 173-174).

In May 1977, the Rabinowitzes and Ciarcia met again. Gerri initially declined to reveal the information, but Ciarcia repeated his promise to do something about her lawsuit (C.A. App. 175-177, 313-314). Gerri then checked the FBI's card files and determined that only Licavoli was the subject of a current investigation. She reported her discoveries to Ciarcia (*id.* at 177-178). This activity violated her FBI employment agreement, in which she had promised not to divulge "any information of any kind" that she obtained as a result of her employment with the FBI (*id.* at 96-98, 155-156; Gov't Exh. 1).

Ciarcia then asked Gerri to check on the nature of the Licavoli investigation. She located the FBI file on Licavoli, secured a copy of a current report, and delivered it to Ciarcia and co-defendant Lanci. When Ciarcia later that evening returned the report

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals.

to Gerri, it was not stapled together as it had been when she turned it over (C.A. App. 179-183, 186-189).[3]

About a week later, Ciarcia asked Gerri why there were numbers in lieu of certain names on the report. Gerri told him that the numbers represented informants. When Ciarcia asked if she could get the names, she advised him that she lacked access to them (C.A. App. 190-191).[4]

In early June 1977, Ciarcia asked Gerri about a wiretap of petitioner (C.A. App. 195, 197). In mid-June, Gerri obtained a copy of an affidavit for a wiretap and delivered it to Ciarcia that evening (*id.* at 192, 194, 195-197). Petitioner joined this meeting shortly afterward. He said he appreciated the information Gerri had provided and assured her that they would help her. He also asked whether he was under investigation by the FBI (*id.* at 193-194, 485-486).[5]

Ciarcia also persisted in his quest for the names of the informants in the reports. Finally, in early

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[3] Copies of this report were later discovered at the auto dealership where Ciarcia worked and were turned over to the FBI (C.A. App. 113, 189-190, 392-393, 410-413; Gov't Exhs. 2-A through 2-E, inclusive).

[4] Informants' files were kept in a special room within the Cleveland FBI office in 1977. Access was strictly limited to a clerk and two or three agents with keys (C.A. App. 99-100, 295). Informants' files were protected from dissemination even more than other FBI information. Thus, a code was used in lieu of informants' names and identifying numbers even in reports submitted to government attorneys (*id.* at 101-102).

[5] In late June 1977, again at Ciarcia's request, Gerri located a second report on Licavoli and provided it to Ciarcia (C.A. App. 197-198; Gov't Exhs. 5-A, 5-B).

July, Gerri gained access to the informants' room when it was left unattended at lunchtime. She hurriedly copied approximately 12 names and identifying numbers on a piece of paper. In a meeting the next day at Ciarcia's office, she hesitated in turning over the list because she was concerned that someone might be hurt. Ciarcia assured her that her fears were groundless. When petitioner arrived at this meeting, Ciarcia told him of Gerri's concerns. As had Ciarcia, petitioner also assured Gerri that no one would be hurt (C.A. App. 199-204, 283-284, 354-355). Ciarcia also mentioned that the Rabinowitzes needed $1,000 for closing costs on their house. Petitioner left for a few minutes and returned with the money (*id.* at 204). Gerri then gave Ciarcia the list, which he and petitioner read. Ciarcia copied the list in his own handwriting and burned Gerri's list in the ashtray (*id.* at 204-206, 284). Petitioner again assured Gerri that her case was being handled (*id.* at 285).[6]

On August 15, Gerri gained entry to the room containing files on informants. She copied by hand some 56 names and identifying numbers and took the list to Ciarcia (C.A. App. 214-216; Gov't Exh. 11). In early September 1977, in response to Ciarcia's request for more current information on the Licavoli investigation, she secured another report, dated August 24, 1977, and took it to Ciarcia (C.A. App. 217-219; Gov't Exhs. 16-A, 16-B). This was the last information that Gerri provided, though several addi-

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[6] Following two other requests by Ciarcia, Gerri looked for information linking Lanci to another FBI investigation, and in August 1977 she obtained a copy of a list of the makes and license numbers of FBI automobiles. She gave this information to Ciarcia (C.A. App. 163, 207-214, 225).

tional requests followed, including one by petitioner on September 24 for information from FBI offices on the West Coast (C.A. App. 232-235, 254-256, 345-347, 487-488).

On October 12, 1977, the Rabinowitzes again met with petitioner, Lanci, and Ciarcia. They discussed the Rabinowitzes' need for $15,000 to use as a down payment for their house (C.A. App. 240-241, 317-319). Ciarcia repeated his assurances to the Rabinowitzes that the money would be provided (*id.* at 242-243, 320, 375). Lanci suggested that petitioner loan the money to Gerri, and petitioner agreed to do so (*id.* at 243, 323-324). The five people at this meeting determined that the proceeds from a fraudulent insurance claim on Gerri's ring would be applied in repayment,[7] as well as approximately $3,000 that Gerri received from the settlement of her lawsuit (*id.* at 245, 326-327). No other schedule of repayment was discussed.

The next evening, the Rabinowitzes again met with Ciarcia. Petitioner arrived moments later, directed Jeffrey to bring in a brown paper bag from his car, and told Gerri that the bag contained $15,000. At Ciarcia's suggestion, a cashier's check was substituted for the cash the next day (C.A. App. 247, 249-250, 338-340).[8]

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[7] Under Ciarcia's direction, Gerri staged the "loss" of her wedding ring in September 1977. She filed a claim with her insurance carrier, and a settlement check in the amount of $4,000 was sent to her in December 1977. She endorsed the check and gave it to Ciarcia (C.A. App. 236-238).

[8] The check was for $14,900. Ciarcia explained that the $100 discrepancy occurred when petitioner returned on the morning of October 14, said he was short of cash, and took $100 (C.A. App. 250, 341-342).

The FBI was alerted in June 1977 to a leak in its Cleveland FBI office, but efforts to discover the source of the leak were unavailing. In January 1978, polygraph examinations were begun on employees who had access to informant information (C.A. App. 103-109). Gerri became alarmed at the prospect of such an examination and told petitioner of her concerns. Petitioner tried to allay her fears; he also said that he might be able to get her a job with the city (*id.* at 257, 348-353). On March 2, she submitted her resignation to the FBI, effective March 9 (*id.* at 111).

On the evening of March 8, 1978, the owner of the auto dealership where Ciarcia worked discovered a box of FBI documents among items that belonged to Ciarcia (C.A. App. 392-394). He turned the box over to an FBI agent that same night (*id.* at 394, 402-405). An inventory of the contents showed that the box included the various reports Gerri had provided, including lists of informants (*id.* at 113-151, 410-419).[9] Handwriting on some of the documents led investigators to Gerri. She and her husband were arrested, confessed their roles in the scheme, pleaded guilty to two counts of bribery, served their sentences, and later testified for the government.

2. At the close of the trial, the defendants requested that the district court instruct the jury that in order to convict for bribery, the jury must find that any defendant's offer of a thing of value preceded Mrs. Rabinowitz's violation of her lawful duty. The court declined to do so; instead, it instructed

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[9] Petitioner's fingerprint was found on the wiretap affidavit (Gov't Exh. 4). Sixty-three of Lanci's prints were found on 12 of the documents, and 47 of Ciarcia's prints were on 10 documents (C.A. App. 428-434).

that a defendant's specific intent to induce Mrs. Rabinowitz's actions must have existed contemporaneously with an offer, promise, or giving of a thing of value (C.A. App. 737-738). The court of appeals held that the trial court's instructions were proper (Pet. App. A4). The court also found the evidence to be "clearly sufficient" to sustain petitioner's conviction (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 13-16) that the district court improperly instructed the jury on the requirements of the bribery statute. As we understand his position, petitioner is contending either that the actual payment of the bribe must precede the official's improper actions or that the evidence was insufficient to connect him with earlier promises made to Mrs. Rabinowitz. In either event, petitioner is incorrect: the former argument fails because it would permit a bribe to be offered with impunity so long as payment were delayed until after its objective had been achieved; and the latter argument finds no support in the record because there was ample evidence of petitioner's participation in the bribery scheme when offers were made, when confidential FBI information was disclosed, and when payment was tendered.

Petitioner appears to contend that simply because money was exchanged after Mrs. Rabinowitz disclosed internal FBI documents, 18 U.S.C. 201(b)(3)

is inapplicable.[10] Aside from the fact that this contention is contrary to the evidence at trial, the short answer is that the statute is not confined to situations where the payment is made before the official acts. *United States* v. *Arroyo*, 581 F.2d 649, 653 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979). The *Arroyo* court recognized that the interpretation urged by petitioner would "encourage the very conduct Congress condemned" (*ibid.*), namely allowing the giving and taking of bribes with impunity because of the timing of the bribe (*id.* at 653-654). Cf. *Woelfel* v. *United States*, 237 F.2d 484, 487-488 (4th Cir. 1956).

Violations of 18 U.S.C. 201(b)(3) do not turn on the timing of payment, as the plain language of the statute demonstrates. This section proscribes not only corrupt gifts, but also "offers or promises" of "anything of value to any public official." There was, as discussed above, evidence at trial that showed not only that Ciarcia promised Mrs. Rabinowitz financial and other assistance prior to her violation of lawful duties, but also that petitioner made similar promises during the course of a continuing relationship between Rabinowitz and the defendants. Thus, in mid-June 1977, when Rabinowitz delivered a copy of a wiretap affidavit, petitioner said he appreciated the information and assured her that she would be helped in the future (C.A. App. 195-197, 485-486). In early July, Rabinowitz delivered the first list of in-

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[10] To the extent petitioner contends (Pet. 13-14) that the "concurrence of the specific intent to induce the official's action *and* the offer, promise or giving * * * must occur * * * at least contemporaneously with, the violation of duty by the official," his claim of error is frivolous. This is precisely what the court charged the jury (see C.A. App. 737-738).

formants' names to petitioner and Ciarcia. At that time petitioner gave her $1,000 and assured her that her lawsuit was being handled (*id.* at 199-204). All this showed that—even under petitioner's construction of the statute—many of the conspirators' inducements preceded improper official actions.[11]

In any event, petitioner misconstrues the statute, and the cases on which he relies (Pet. 14-15) do not support a claim of error. While *United States* v. *Arthur*, 544 F.2d 730 (4th Cir. 1976)—which involved a conviction under a different statute—states that intent to bribe is not shown by a gift motivated by some generalized hope of ultimate benefit (*id.* at 734), that decision does not hold that actual payment of the inducement must precede the official's act or that the payment must expressly be linked to a specific act. In fact, the court said that intent could be shown by a course of conduct of favors and official acts "even though no particular gift or favor is directly connected to any particular act." *Ibid.*

Similarly, in *United States* v. *Strand*, 574 F.2d 993, 996 (9th Cir. 1978), the court approved instructions virtually identical to those at issue here. There the government employee accepted money after he violated his duty (*id.* at 995). In those circumstances, the court held that the instructions properly

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[11] Moreover, after petitioner gave Rabinowitz $14,900 in October 1977, Ciarcia requested further information (see C.A. App. 254-256, 345-347, 487-488). It is therefore clear that the conspirators viewed the payment in part at least as an inducement for future actions. That their requests ultimately were unsuccessful is irrelevant. The crime is complete at the point a bribe is offered or promised for the purpose of influencing the official's action. *United States* v. *Brewster*, 408 U.S. 501 (1972).

conditioned guilt on a finding that the official accepted the money in return for the violation of his lawful duty. *Id.* at 996. And, contrary to petitioner's claim (Pet. 14), the court in *United States* v. *Johnson*, 621 F.2d 1073 (10th Cir. 1980), did not hold that a payment violated Section 201 only if it was specifically contingent on future action. Instead, the court there affirmed the defendant's conviction over his claim that the official's action predated his awareness of the bribe offer. *Id.* at 1076.[12]

2. Relying on *United States* v. *Jennings*, 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973), petitioner argues (Pet. 16-18) that the trial court should have instructed that the government must prove that petitioner knew Geraldine Rabinowitz was a public official who possessed some authority to act. Although the court refused to give petitioner's requested instruction, it informed the jury several times that it could not convict unless it found that a defendant intended to induce Mrs. Rabinowitz to violate her lawful duty by disclosing confidential FBI records (C.A. App. 705-706, 715-716, 735-737, 739).

In any event, *Jennings* does not support petitioner's contention. The court there merely held that the government had to show a defendant's awareness that the person he sought to bribe was an official. See 471 F.2d at 1313. Moreover, the "authority to

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[12] Petitioner's contention (Pet. 18-22) that the evidence was insufficient to sustain his conviction is simply another version of his argument that the payment of a bribe must precede the official's violation of lawful duties. This claim has no basis in law or in the facts of this case. Accordingly, both courts below properly rejected this fact-bound contention and it presents no occasion for further review.

act" language urged by petitioner is appropriate only in the context of a Section 201(b)(1) prosecution, not one under subsection (b)(3). The former subsection speaks of influencing "an official act," while subsection (b)(3) deals with inducing an official to violate his duty. Accordingly, the district court properly declined petitioner's tendered instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submited.

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